Editor's note: Reconsideration granted; decision affirmed -- See Jessie A. Brown (On Reconsideration), 28 IBLA 339 (Jan. 17, 1977), Appealed -- remanded, Civ. No. F-77-128 (E.D.Cal. June 29, 1979), Hearing ordered by order dated April 19, 1983 --See 28 IBLA 344A th C.

JESSIE A. BROWN

IBLA 75-305 Decided December 1, 1975

Appeal from decision of the California State Office, Bureau of Land Management, denying application R 1069 made pursuant to the Mining Claims Occupancy Act.

Affirmed.

1. Mining Occupancy Act: Qualified Applicant

   One alleging that he is a "qualified applicant" under the Mining Claims Occupancy Act, as amended, 30 U.S.C. § 701 et seq. (1970), must file a timely application in his own name to be eligible for the relief provided by the Act. Where a son who may have been qualified under the Act does not file timely, but an application is filed by his mother who is record title owner in her own name, that application cannot be considered to have been made on behalf of the son, even though he may be the equitable owner of the claim on the basis of being the beneficiary of an oral trust in the claim created by his mother and (now deceased) father at the time they purchased the claim.

2. Mining Occupancy Act: Qualified Applicant

   An application filed under the Mining Claims Occupancy Act, as amended, 30 U.S.C. § 701 et seq. (1970), is properly rejected on the basis that the

> applicant is not qualified for relief under the Act where the record shows that the applicant did not live on the claim or use it as a principal place of residence during the qualifying period of time set forth in the Act.

APPEARANCES: M. William Tilden, Esq., Lonergan, Jordan, Gresham, Varner & Savage, San Bernardino, California.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Appellant has appealed from a decision of the California State Office, Bureau of Land Management, dated December 12, 1974, which rejected appellant's application for relief under the Mining Claims Occupancy Act (MCOA) of October 23, 1962, 76 Stat. 1127, as amended, 30 U.S.C. § 701 et seq. (1970).

On October 19, 1967, appellant 1/ filed an application (R 1069) for relief under the Mining Claims Occupancy Act, supra, 2/ to purchase a portion of the Sunland Wash placer mining claim located in the W 1/2 NW 1/4 NE 1/4, sec. 25, T. 7 S., R. 32 E., M.D.M., Inyo County, California.

The Mining Claims Occupancy Act authorizes the Secretary of the Interior to convey to a qualified applicant an interest, up to and including a fee simple, in and to an area of 5 acres or less, within an unpatented mining claim. A qualified applicant is defined in section 2 of the Act, 30 U.S.C. § 702 (1970), which provides:

1/ Appellant's husband, William Louis Tallon, died in 1965. In 1967 appellant's name was Jessie A. Tallon. She has since remarried and her name is now Jessie A. Brown.

2/ 43 CFR 2551.2(c) listed the information which should be included in a MCOA application. Among other things required is the date the claim was declared invalid or the date the claim was relinquished to the United States. Appellant's application was blank as to this information. There is no evidence in the record that the claim was relinquished. Since appellant's claim was not invalidated at the time of filing of the MCOA application, appellant should have filed a petition, pursuant to 43 CFR 2551.1, and requested a qualified officer of the United States to state whether or not he believed her claim to be invalid.

In any event, appellant's claim was declared null and void ab initio in the same decision, dated September 26, 1973, that originally rejected the MCOA application.

> For the purposes of this [Act] a qualified applicant is a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

The term "occupant-owner" is defined in the regulations, 43 CFR 2550.0-5(b), as referring to:

> [P]ersons who, on October 23, 1962, claimed title to valuable improvements which they or their predecessors in interest have constructed on an unpatented mining claim even though title to the improvements might ultimately be found to be in the Government.

The claim was originally located in 1950 by Mrs. Lottie Hughes. Mrs. Hughes sold the claim to Mrs. Rochelle Kilgore in October 1953. Mrs. Kilgore in turn quitclaimed the Sunland Wash to Louis Tallon and Jessie Tallon, husband and wife, as joint tenants, on June 10, 1954. The Tallons held the claim as joint tenants until the death of Louis Tallon, also known as William Louis Tallon, in 1965. On September 8, 1965, appellant recorded an affidavit - Death of Joint Tenant, relating to the Sunland Wash claim.

On September 26, 1973, the California State Office, BLM, issued a decision rejecting application R 1069 and declaring the Sunland Wash mining claim null and void ab initio. The decision held that appellant did not occupy the land as a principal place of residence from July 23, 1955, through October 23, 1962, as required by the Mining Claims Occupancy Act, supra. The claim was held void ab initio because power site reserve No. 293 had withdrawn the land embraced by the claim from all forms of appropriation, including the mining laws, on October 18, 1912. The land was, therefore, not subject to location in 1950 when the Sunland Wash claim was located.

Subsequently, on October 25, 1973, the California State Office issued a decision vacating that part of the September 26, 1973, decision relating to the Mining Claims Occupancy application R 1069 filed by appellant. The reason given was that appellant's attorney had requested that such decision be set aside to allow the real party in interest, W. L. Tallon, Jr., to be heard and to allow evidence to be presented relating to the ownership of the claim. Appellant was allowed 60 days to submit additional evidence.

During such period affidavits were filed by appellant and by her son, W. L. Tallon, Jr. Therein, appellant swore that when she and William Louis Tallon took title to the Sunland Wash Claim in 1954 it was done with the understanding that title was to be held for the benefit of W. L. Tallon, Jr., who at that time was only 16 years old; that when Mr. Tallon died and she obtained full title to the property the understanding continued that she held the property for the benefit of her son. She also swore that her son at all times paid the taxes on the property and provided the maintenance of the property. She stated that the property had been occupied solely by her son since June 1954. She believed that since the title to the claim was in her name, she should file the MCOA application, but that any interest or rights she might gain by virtue of her application would be for the benefit of her son and she, therefore, assigned any interest she might have to her son.

The affidavit of W. L. Tallon, Jr., is substantially the same as the one submitted by his mother.

After reviewing the affidavits and exhibits filed by appellant and her son, the California State Office, BLM, again rejected application R 1069 on December 12, 1974. The decision held that neither appellant nor her son were qualified applicants under the MCOA.

On appeal appellant asserts that while she and Mr. Tallon were the record owners of the claim, her son at all times was the equitable owner, being the beneficiary of an oral trust. She argues that oral trusts in land are recognized in California and that her son was the occupant-owner of the claim within the meaning of the MCOA.

[1] We need not decide whether one in Tallon Jr.'s position could be a qualified applicant, because even assuming that he was and that he was present on the claim during the qualifying years 1955-1962 so as to qualify him as an "owner" within the meaning of the Act, he still could not be granted relief.

Section 1 of the Act, 30 U.S.C. § 701 (1970) provides:

> Any conveyance authorized by this section, however, shall be made only to a qualified applicant, as that term is defined in section 702 of this title, who applies therefor within the period ending June 30, 1971, * * *.

Tallon Jr. did not file a timely application; in fact, he never personally applied for relief under the Act. Therefore, he may not be granted relief under its provisions.

[2] Nor is his mother a qualified applicant under the MCOA. Although she filed an MCOA application, she admits that she did not occupy the claim 3/ and does not now seek a conveyance for herself.

Therefore, appellant is not a qualified applicant. The Secretary of the Interior is limited by statute in that he may convey only to a qualified applicant. Funderberg v. Udall, 396 F.2d 638 (1968). Appellant's son did not apply and the statutory deadline (June 30, 1971) for filing an application has long since expired.

Thus, the applicant for relief does not qualify, yet her son, who, assuming the above, was qualified for relief, did not apply.

Appellant is, in essence, asking us to couple her application with the qualifications of her son to allow relief to be granted under the Act. This we cannot do. 4/

For the above stated reasons, relief under the MCOA is not available to appellant nor to her son.

3/ Although in her application she stated that she occupied the claim "off and on", in her more recent affidavit she stated that "the property has been occupied since 1954 solely by W. L. Tallon, Jr., and neither his father prior to his death, nor myself, have done anything with regard to the property * * *."

4/ The BLM has indicated that some relief may be available to Tallon Jr. Realizing the hardship involved herein, we feel that the BLM should carry through with the plan which was touched on in the September 26, 1973, decision. Therein it was stated that the lands embracing the claim herein were part of those lands listed as being withdrawn on April 5, 1931, from all forms of appropriation, except mining, to protect the water supply of the City of Los Angeles. Also, it was indicated that the City of Los Angeles would not object to the issuance of a 5-year Special Land Use Permit to accommodate W. L. Tallon, Jr.'s occupancy, such permit being subject to renewal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Edward W. Stuebing
Administrative Judge